BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH H. TOLLE Claimant	)	
VS.	)	
HARRAH'S KANSAS CASINO CORP. Respondent	)	Docket No. 1,009,917
AND	)	
UNITED STATES FIRE INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requested review of the July 13, 2005 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on October 25, 2005.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. D'Ambra M. Howard, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The Board also considered the transcript of the July 6, 2004 Settlement Hearing.

ISSUES

The Administrative Law Judge (ALJ) denied claimant compensation, finding that claimant's condition represented a natural and probable consequence of his initial accident, injury and resulting surgery that had been sustained while under the coverage of a different insurance carrier and for which claimant had already entered into a full and final settlement.

The claimant requests review of the ALJ's conclusion concerning the compensability of this claim, arguing that he suffered a second accident and a new injury after his first injury healed and that the second series of accidents and injury arose out of and in the course of his employment with respondent. Claimant further argues that he suffered a whole body impairment rather than a scheduled injury and is entitled to work disability in the amount of 74 percent, utilizing a 48 percent task loss as testified to by Dr. Daniel Zimmerman and a 100 percent wage loss.

Respondent argues that claimant failed to meet his burden of proving his entitlement to compensation and requests that the ALJ's Award be affirmed. Respondent requests that the Board assess costs against claimant. Respondent also requests the Board find that $13,623.23 of medical and temporary total disability benefits paid to claimant were paid in error and that respondent and its insurance carrier are entitled to reimbursement by the Kansas Workers Compensation Fund. In the alternative, respondent requests the Board enter an order based upon a scheduled injury to the shoulder in a percentage of permanent impairment that takes into account the preexisting permanent impairment directly attributable to claimant's previously settled work injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began work for respondent in December 1997. He started in the food and beverage department as a server and cook and was transferred to the information technology (IT) department. His job duties included taking care of computers, installing hardware and equipment, moving equipment and taking care of end-of-job processing. Claimant started noticing problems with his right shoulder in late 2000 and early 2001 and went to see his family physician, Dr. Steve Puderbaugh.

Dr. Puderbaugh sent claimant to Dr. Kurt Knappenberger, who performed rotator cuff repair on claimant's right shoulder on November 16, 2001. Claimant was off work six weeks. On March 13, 2002, he was released from treatment by Dr. Knappenberger with no restrictions. Claimant returned to his regular job duties with respondent. However, on May 10, 2002, claimant returned to Dr. Knappenberger, complaining that his shoulder had worsened after his release from treatment. He claimed he had not fallen or hit his shoulder and that nothing out of the ordinary had occurred to have re-torn his rotator cuff. Upon examination, Dr. Knappenberger noted "that there is ecchymosis down the biceps and he has rather significant crepitation of the subacromial space on range of motion of his shoulder, much more than what I recall postoperatively."[1] Dr. Knappenberger put claimant

[1]Knappenberger Depo., Ex. 2 at 20.

on anti-inflammatory medication and instructed claimant to return in three or four weeks. He also said that if claimant's symptoms continued, "we may have to entertain the possibility of a retear of his [rotator cuff] repair."[2] Claimant returned to Dr. Knappenberger for follow-up on June 7, 2002, and informed him that his pain was gone. Claimant was again dismissed from treatment. On August 26, 2002, Dr. Knappenberger wrote a letter to respondent's insurance carrier wherein he opined that claimant had an 8 percent impairment to the right upper extremity but needed no restrictions.

In July 2002, claimant was terminated by respondent for poor job performance in the IT department. Respondent offered claimant a position in another department, but claimant declined the position, stating he could not physically handle the work. Claimant was not told what his salary would have been had he accepted the position. Claimant has not worked since his termination from respondent.

Claimant went back to see Dr. Knappenberger on November, 19, 2002. At that time, he complained of soreness and pain in his shoulder, as well as popping and clicking. Physical examination showed "significant popping and clicking of the subacromial space on range of motion. He maintains fairly good strength in abduction and forward flexion, but again the popping and clicking in the shoulder has increased since I last saw him."[3] Dr. Knappenberger again put claimant on an anti-inflammatory medicine. An MRI done on claimant's right shoulder on November 27, 2002, showed a complete rotator cuff tear. Claimant did not want a second surgery, so he was treated conservatively. When claimant returned to Dr. Knappenberger on June 3, 2003, he had complaints of increasing pain and soreness in his right shoulder. After discussing his options, claimant elected to have the re-torn rotator cuff surgically repaired.

Dr. Knappenberger performed the second surgery on July 11, 2003. Claimant was followed postoperatively through October 31, 2003, when he was released with a permanent restriction of sedentary work only. After the second surgery, Dr. Knappenberger opined that claimant had an additional 4 percent impairment to his right upper extremity above his original rating of 8 percent. However, when rating claimant, Dr. Knappenberger did not do all the range of motion tests and, in fact, claimant was not present. Dr. Knappenberger rated claimant based on his medical records and recollection of claimant and stated he based his ratings on the AMA *Guides*.[4] Dr. Knappenberger last saw claimant on March 15, 2005. At that time, he said claimant "certainly could consider the possibility of further subacromial decompression or removal of calcium deposits within the shoulder to see if they could help with some of the symptoms as he is having with the

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[2] *Id.*

[3] *Id.* at 17.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

shoulder."[5] In a June 12, 2003 letter to one of respondent's attorneys, Dr. Knappenberger wrote:

> It is a well-known fact that re-tears of a previous repair occur on a rather frequent basis. I feel that probably in this situation that his continued activities and the fact that he had a previous rotator cuff repair, that both contributed to the retear. Without any further evidence or knowledge I would estimate that they are equally involved.[6]

Although Dr. Knappenberger said any activities, including activities of daily living, could contribute to a retear of the rotator cuff, he agreed that claimant's work activities with respondent between his March 13, 2002, and May 10, 2002, examinations increased his risk for a retear and were more likely to have caused the retear than were claimant's less physical activities at home or away from work during that time period.

Claimant's attorney sent him to Dr. Daniel Zimmerman for an examination on April 1, 2004. Dr. Zimmerman reviewed the medical records of Dr. Knappenberger and examined claimant. Dr. Zimmerman opined that based on the AMA *Guides*, claimant sustained a 15 percent permanent partial impairment of the right upper extremity, which could be converted to a 9 percent whole person rating. Dr. Zimmerman also stated that claimant had a four-inch scar from the two surgeries. Dr. Zimmerman described the scar as well-healed and nontender to touch. He believed that claimant was entitled to an additional 3 percent permanent partial impairment of the body as a result of claimant's scar, for a total impairment of 12 percent to the body as a whole. Dr. Zimmerman testified he believed that half the rating for the shoulder was due to claimant's initial injury, and the other half of the rating was for the re-injury that occurred somewhere around May 10, 2002. Dr. Zimmerman also applied the same apportionment to the rating for claimant's scar.

Claimant saw Dr. Ernest Neighbor, a board certified orthopedic surgeon, on January 24, 2005, at the request of respondent's attorney. Dr. Neighbor examined claimant and stated there was no basis for giving claimant a rating based on his surgical scar pursuant to the AMA *Guides*, since it was a well-healed scar. Dr. Neighbor interpreted the AMA *Guides* as allowing ratings for scars in cases of burns and open fractures where there have been skin grafts. Dr. Neighbor diagnosed claimant with status post-rotator cuff repair with limitation of elevation and internal rotation. Dr. Neighbor gave claimant a rating of 15 percent to the shoulder based on the AMA *Guides*. This rating was after both surgeries. On cross-examination, Dr. Neighbor testified when he did the range of motion testing, he did not use an inclinometer or any sort of testing device to come up with the range of motion, but estimated by eye-balling. Further, he did not use any tools in determining strength.

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[5] nappenberger Depo., Ex. 2 at 1.

[6] *Id.* at 11.

When claimant filed this claim, he listed dates of accident as a series from April 2, 2001, to July 12, 2002. Respondent was insured by Travelers Insurance Co. through February 18, 2002. After that date, respondent's insurance carrier was United States Fire Insurance Co. In a settlement hearing held July 6, 2004, claimant settled his claim with Travelers Insurance Co. for any accidents and injuries occurring through February 18, 2002.

The ALJ found the settlement significant because "if the Claimant's current disability is the natural and probable progression of an injury that occurred before February 18 [2002] then it is barred by the terms of the settlement with Travelers. A *new* accident would be compensable."[7]

Dr. Knappenberger described the retearing of claimant's rotator cuff repair as a natural consequence of the original injury and its surgical repair and testified that "a retear of a rotator cuff occurs because there's a failure of healing of the rotator cuff to occur. And so any activities, even daily activities of living, can contribute to that."[8] But, as noted previously, he also said that the claimant's subsequent work activities were the most likely activities that caused or contributed to the retear.

Dr. Neighbor testified: "It's my opinion that the retear occurred as a result of the original tear and the subsequent surgery."[9] He further stated that retears are a known complication of rotator cuff surgery and can happen even in the absence of any type of trauma or reinjury.

Dr. Zimmerman testified that the retear occurred while claimant was back to work, "banging around, carrying the computers."[10] However, Dr. Zimmerman admitted that his information concerning claimant's job duties was given to him by claimant's attorney and was not something claimant told him. He later testified that often retears are a natural consequence of the initial tear and that they can occur even with just normal activity and use.

All three doctors agree that the retear most likely occurred sometime between March 2002 and May 2002, while claimant was still working for respondent.

The Board finds the testimony of the treating surgeon, Dr. Knappenberger, to be the most persuasive concerning the causation of the retear and finds the cause of the retear

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[7]ALJ Award (July 13, 2005) at 2-3.

[8]Knappenberger Depo. at 21.

[9]Neighbor Depo. at 11.

[10]Zimmerman Depo. at 8.

was the combination of the initial accident and first surgery, together with claimant's subsequent activities, especially his work activities between March 13, 2002, and May 10, 2002.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity with respondent aggravated, accelerated or intensified the underlying disease or affliction.[11]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[12], the Kansas Supreme Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[13], the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[14], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an

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[11] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 114, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[12] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[13] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[14] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[15], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Here, the Board finds the circumstances to contain elements of both *Gillig* and *Stockman*. Claimant's upper extremity condition never completely resolved. Although claimant had been released to regular duties by the treating physician, the pain returned with his increased physical activity, primarily at work. As such, claimant's retear injury is causally related to his subsequent series of accidental injuries after his release and return to work following his first surgery.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon this record, the Board finds that claimant's condition arose out of his employment activities after his return to work with respondent and, therefore, should not be treated as a natural consequence of the original injury with respondent.

As for the percentage of functional impairment to the shoulder, the Board considers the rating opinions of Dr. Neighbor and Dr. Zimmerman more persuasive than Dr. Knappenberger's in this instance. Our Workers Compensation Act requires the use of the AMA *Guides* when rating functional impairment. Dr. Neighbor and Dr. Zimmerman are more experienced at interpreting and applying the AMA *Guides* than is Dr. Knappenberger. Both Dr. Neighbor and Dr. Zimmerman rated claimant's combined impairment to the shoulder following the two surgeries at 15 percent (exclusive of any separate rating for the surgical scar). Dr. Zimmerman apportioned the 15 percent ratings equally to the original tear and the retear of the rotator cuff. Accordingly, the Board finds claimant's impairment for the series of accidents beginning March 13, 2002, when he was released to return to work following his first surgery, and ending July 23, 2002, his last day of work with respondent, is 7.5 percent to the right arm at the shoulder level.

Claimant argues he is entitled to a whole body impairment rather than a scheduled injury. Although claimant complained of low back pain to Dr. Knappenberger, he was never treated for his problem, nor was his low back problem given a disability rating by any

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[15] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 728, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

of the doctors. Claimant bases his claim for a whole body impairment on a his four-inch scar which resulted from his two surgeries. Claimant testified his scar is tender to the touch and itches sometimes. Dr. Zimmerman gave the claimant a 3 percent whole body disability rating for the scar, based on the AMA *Guides*. Dr. Zimmerman opined that half of the rating would be attributed to the initial injury and subsequent surgery, and half would be attributed to the retear and subsequent surgery.

Dr. Neighbor examined claimant's scar and stated that there was no basis for giving claimant a rating based on his surgical scar pursuant to the AMA *Guides*, since it was a well-healed scar. Dr. Neighbor interpreted the AMA *Guides* as allowing ratings for scars in cases of burns and open fractures where there have been skin grafts. He did not consider a well-healed surgical scar a skin disorder within the meaning of the AMA *Guides* and stated that giving an impairment rating for a well-healed surgical scar is "ludicrous."[16]

Although he was not specifically asked about the scar, Dr. Knappenberger likewise did not give a separate or additional rating for the surgical scar. The Board finds that claimant is not entitled to an additional percentage of functional impairment for the surgical scar in this instance. Furthermore, even if the scar was rateable, that rating would be to the shoulder and not to the body as a whole. Accordingly, the Board does not need to address the evidence of wage and task loss or the claim for work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated July 13, 2005, is reversed and an award is entered in favor of claimant Kenneth H. Tolle and against respondent Harrah's Kansas Casino Corporation and its insurance carrier United States Fire Insurance Company as follows:

Claimant is entitled to 12.71 weeks of temporary total disability compensation at the rate of $393.12 per week in the amount of $4,996.56 followed by 15.92 weeks of permanent partial disability compensation, at the rate of $393.12 per week, in the amount of $6,258.47 for a 7.5 percent loss of use of the right shoulder, making a total award of $11,255.03, all of which is ordered paid in one lump sum less amounts previously paid.

All authorized medical expenses and all reasonable medical treatment expenses related to the right upper extremity injury are ordered paid subject to the Kansas Workers Compensation Schedule of Medical Fees.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

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[16]Neighbor Depo. at 25.

The claimant is entitled to unauthorized medical expenses up to the statutory maximum upon presentation of such bills to respondent.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Reporters' fees and costs are assessed to respondent and its insurance carrier as itemized in the ALJ's Award.

IT IS SO ORDERED.

Dated this _____ day of October, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director